

ORIGINAL

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U.S. DISTRICT COURT
NORTHERN DIST. OF TX
FT. WORTH DIVISION

IN THE UNITED STATES DISTRICT COURT 2013 JUN -6 PM 1:32
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION
CLERK OF COURT

FLEXIBLE INNOVATIONS LTD.,

Plaintiff,

v.

**IDEAMAX, EUGENE LEE, and
AEKYUNG LEE**

Defendants.

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§
§
§

Case No. 4:12-CV-856-A

**APPENDIX TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AS TO
PLAINTIFF'S DAMAGES SOUGHT FOR UNFAIR COMPETITION WITH BRIEF IN
SUPPORT**

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“EXHIBIT A”

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

FLEXIBLE INNOVATIONS LTD.,) CASE NO. 4:12-CV-856-A
Plaintiff,)
VERSUS) FORT WORTH, TEXAS
IDEAMAX, ET AL.,) MAY 24, 2013
Defendant.) 3:02 P.M.

VOLUME 1 OF 1
TRANSCRIPT OF TELEPHONE CONFERENCE
BEFORE THE HONORABLE JOHN McBRYDE
UNITED STATES DISTRICT COURT JUDGE

A P P E A R A N C E S :

FOR THE PLAINTIFF: MR. RICHARD L. SCHWARTZ
MR. THOMAS F. HARKINS, JR.
Whitaker Chalk Swindle & Schwartz
301 Commerce Street, Suite 3500
Fort Worth, Texas 76102
Telephone: 817.878.0524

FOR THE DEFENDANT: MR. JOHN T. WILSON
MS. SUL LEE
Wilson Legal Group, PC
16610 Dallas Parkway, Suite 1000
Dallas, Texas 75248
Telephone: 972.248.8080

COURT REPORTER: MS. DEBRA G. SAENZ, CSR, RMR, CRR
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Proceedings reported by mechanical stenography, transcript
produced by computer.

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Appendix 4

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P R O C E E D I N G S

May 24, 2013 - 3:02 p.m.

THE COURT: We're on the line. This is a conference call between the Court and the attorneys in Number 4:12-CV-856-A. It's United States -- no, it's Flexible Innovations Limited versus IdeaMax, Eugene Lee, and Aekyung Lee.

And I understand on the line for the plaintiff is Richard Schwartz; is that correct?

MR. SCHWARTZ: Yes, Your Honor.

THE COURT: And Thomas Harkins?

MR. HARKINS: Yes, Your Honor.

THE COURT: And I suspect y'all are on a speaker phone?

MR. SCHWARTZ: We are, Your Honor. Is that a problem?

THE COURT: Yes, it's a problem. We don't hear well when you're on a speaker phone.

MR. SCHWARTZ: All right. I will pick up.

THE COURT: That's Mr. Schwartz?

MR. SCHWARTZ: Yes, sir, I picked up. Is that better?

THE COURT: Okay. We can hear you now.

MR. SCHWARTZ: Very good, sir.

THE COURT: Okay. On the line for the defendant is

1 way to calculate lost profits as to trademark, as opposed to
2 unfair competition?

3 MR. WILSON: In this case, yes, Your Honor, because,
4 for instance, Microclean is claimed under the unfair
5 competition section, but Microclean is not claimed under the
6 trademark section, so it's not segregated out. Their damages
7 are not separated and identified. Microclean gets sucked up
8 into the trademark infringement area, when it's not pled. And
9 that's on page 7 of our --

10 THE COURT: Do you agree with what he just said,
11 Mr. Schwartz, that it has to be broken down?

12 MR. SCHWARTZ: No, Your Honor, for several reasons,
13 one of which is --

14 THE COURT: Mr. Schwartz, I'm going to tell you how
15 we're going to handle this. I want you to break -- provide to
16 him over the weekend, or later today, a breakdown, in as much
17 detail as you possibly can, of the elements of damage as to
18 each theory of recovery and as to each type of damage.

19 To the extent you don't provide to him a detailed
20 statement of the damages broken down in an appropriate way,
21 you will forfeit your right to recover those damages.

22 So you may want to discuss with Mr. Wilson exactly
23 what he considers to be an appropriate breakdown to take that
24 into account in deciding how you'll provide the breakdown.
25 Because like I say, if you don't have it broken down in such a

1 way that it fits the legal theories you're advocating and the
2 way it should be broken down, you'll simply forfeit your
3 damages to the extent you haven't provided it. So I'll leave
4 it that way.

5 Mr. Wilson, you might want to give some thought,
6 when we get off the telephone, you and Mr. Schwartz, to
7 continuing on the conversation to resolve what, between the
8 two of you, that breakdown should consist of.

9 MR. SCHWARTZ: Your Honor, may I make a request?

10 THE COURT: I expect that to be delivered to
11 Mr. Wilson no later than, oh, sometime over the weekend.

12 Yes, Mr. Schwartz, you can make a request.

13 MR. SCHWARTZ: The problematical issue associated
14 with this is that the unfair competition part of the case
15 hasn't -- is not premised upon Microclean. It has to do with
16 the manner in which the defendants have used their U.S. Patent
17 in trying to sell their product in an improper manner. So,
18 it's not an issue of a relationship with Microclean.

19 And secondarily, we don't have the documents from
20 the defendant. They didn't give us the robustness of document
21 to make those kinds of separations.

22 THE COURT: Mr. Wilson -- I mean, Mr. Schwartz, if
23 you don't have what it takes to prove damages, then, of
24 course, you won't include that in the damages. I want you to
25 give to Mr. Wilson everything you have, in dollar amounts, by

1 THE COURT: Okay. And I haven't had -- I haven't
2 had a motion complaining about those things, and it's too late
3 to start complaining about it now.

4 MR. WILSON: Okay. Understood.

5 THE COURT: Okay. Anything else we need to talk
6 about?

7 MR. WILSON: Um --

8 THE COURT: Okay. I'll see y'all Tuesday morning,
9 and be sure you have with me (sic) the documents that I've
10 required that you exchange over the weekend. Have that with
11 you Tuesday morning, so I can see what's been done.

12 MR. WILSON: Thank you, Your Honor.

13 THE COURT: Have a good weekend all of you.

14 MR. SCHWARTZ: Thank you, Your Honor.

15 (End of Proceedings)

REPORTER'S CERTIFICATE

16 I, Debra G. Saenz, CSR, RMR, CRR, certify that the
17 foregoing is a true and correct transcript from the record
of proceedings in the foregoing entitled matter.

18 I further certify that the transcript fees format
19 comply with those prescribed by the Court and the Judicial
Conference of the United States.

Signed this 24th day of May, 2013.

20 /s/ Debra G. Saenz
21 DEBRA G. SAENZ, CSR, RMR, CRR
22 Texas CSR No. 3158, Exp. 12/31/13
23 Official Court Reporter
 The Northern District of Texas
 Fort Worth Division

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“EXHIBIT B”

Paul Beeler

Subject: FW: Ideamax Disclosure Requests as Orderd by the Court
Attachments: image003.jpg

From: Rocky Schwartz <rschwartz@whitakerchalk.com>
Date: May 27, 2013, 2:43:57 PM CDT
To: "John T. Wilson" <john@wilsonlegalgroup.com>
Cc: Tom Harkins <tharkins@whitakerchalk.com>
Subject: RE: Ideamax Disclosure Requests as Orderd by the Court

John ...

Confirming our phone conversation ... Flexible Innovations is not seeking specific economic damages for unfair competition ... it is seeking injunctive relief and further is of the view that the acts of unfair competition may be considered in considering a possible multiple damages award for trademark infringement ...

Regards ... Rocky

Richard "Rocky" L. Schwartz
Whitaker Chalk Swindle & Schwartz PLLC
301 Commerce Street, Suite 3500
Fort Worth, Texas 76102
rschwartz@whitakerchalk.com
817.878.0524 Direct
817.878.0501 Fax
817.429.6268 Metro



From: John T. Wilson [<mailto:john@wilsonlegalgroup.com>]
Sent: Monday, May 27, 2013 2:34 PM
To: Rocky Schwartz
Subject: Re: Ideamax Disclosure Requests as Orderd by the Court

Please confirm you are no longer seeking damages for unfair competition. Thanks, John

Sent from my iPhone

On May 27, 2013, at 1:57 PM, "Rocky Schwartz" <rschwartz@whitakerchalk.com> wrote:

John ...

See detailed response below ...

Also ... attached see new Exhibit 64 prepared by Alan Nagorzanski in support of the below breakouts ...

Also ... see Exhibit 12.1 ... an individual page within Exhibit 12 ...

No objection to the admissibility Defendants' Exhibits 1-35, 40-48, 50-58, 60-63, 65-69 as these are believed to be identical to those identified by Plaintiff [if not , please detail which ones are not identical] ...

Plaintiff objects to 70 and 71 upon relevancy grounds ... If Defendants wish to keep these documents on the list ... then Plaintiff wants to add the respective registrations (attached) as Exhibits 72 and 73 that are related to these Office Actions of Exhibits 70 and 71 ...

I will call you soon to discuss ...

Regards ... Rocky

Richard "Rocky" L. Schwartz
Whitaker Chalk Swindle & Schwartz PLLC
301 Commerce Street, Suite 3500
Fort Worth, Texas 76102
rschwartz@whitakerchalk.com
817.878.0524 Direct
817.878.0501 Fax
817.429.6268 Metro

<image001.jpg>

From: John T. Wilson [<mailto:john@wilsonlegalgroup.com>]
Sent: Friday, May 24, 2013 3:51 PM
To: Rocky Schwartz
Cc: Paul Beeler; Tom Harkins; Sul Lee; Amanda Tellez
Subject: Ideamax Disclosure Requests as Ordered by the Court
Importance: High

Rocky,

Based upon the Court's ruling during the conference today, we are requesting that you provide your ordered breakdown of damages by the following categories:

- Claims for Defendants' sales due to trademark infringement of the DigiClean trademark due to Defendants' sales of DigiClean/MicroClean;

A minimum of 25% or higher of \$1,203,239 for sales 2.21.12 thru 3.8.13

A minimum of 25% or higher of \$1,265,185 for sales 2.21.12 thru 4.10.13

- Claims for Defendants' sales due to trademark infringement of the DigiClean trademark due to Defendants' sales of DigiPad;

A minimum of 25% or higher of \$138,473 for sales from 2.21.12 thru 3.8.13/4.10.13

- Claims for Defendants' sales due to trademark infringement of the DigiClean trademark due to Defendants' sales of DigiCloth;

No additional damages are claimed because of these sales

- Claims for Defendants' sales due to trademark infringement of the DigiClean trademark due to Defendants' sales of DigiStand;

No additional damages are claimed because of these sales

- Claims for Plaintiff's lost profits due to trademark infringement of the DigiClean trademark from November 22, 2012 to March 8, 2013;

A minimum of 25% or higher of \$119,754

- Claims for Defendants' sales due to unfair competition (e.g. due to Defendants' claims regarding patents, legality, quality, etc.); and

No additional damages are claimed because of these sales

- **Claims for Plaintiff lost profits due to unfair competition from February 21, 2012 through March 8, 2013.**

No additional damages are claimed because of these lost profits

Plaintiff does not agree with the 3.8.13 limitation ... as evidence shows that Defendants' infringement continued even after entry of the Court's injunction ...

Treble damages based upon trademark infringement amounts above ... but include aggravating factors of unfair competition ...

Additionally, we would request clarification as to whether you are seeking treble damages for both trademark infringement and unfair competition or only one or the other. Please provide us this information over the weekend as ordered by the Court during today's conference.

Thanks,

John

<image004.png>

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<FI v IdeaMax -- Exhibits 5-27-13 .pdf>

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“EXHIBIT C”

Flexible Innovations v. IdeaMax
Range of Lost Profits to Flexible Innovations

	A	B	C = A * B	D	E = A * D	F = C + E	G	H = F * G
Period	IdeaMax Infringing Sales [1]	IdeaMax Profit Margin	IdeaMax Profit from Infringing Sales	Additional Profit Margin had Flexible Made Sales	Additional Profit had Flexible Made Sales	Total Profit Had Flexible Made All Sales	Minimum Sales % Achieved by Flexible	Minimum Lost Profits
Damages as Claimed								
2/21/12 to 12/31/12	\$1,141,933	40.29%	\$460,033	0%	\$0	\$460,033	25%	\$115,008
1/1/13 to 4/10/13	\$261,726	21.94%	\$57,414	14.66%	\$38,357	\$95,771	25%	\$23,943
Total:	\$1,403,658		\$517,447		\$38,357	\$555,804		\$138,951

Requested Breakdowns:**1. DigiClean / MicroClean**

2/21/12 to 12/31/12	\$1,009,621	40.29%	\$406,730	0%	\$0	\$406,730	25%	\$101,683
1/1/13 to 4/10/13	\$255,564	21.94%	\$56,063	14.66%	\$37,454	\$93,517	25%	\$23,379
Total:	\$1,265,185		\$462,793		\$37,454	\$500,247		\$125,062

2. DigiPad

2/21/12 to 12/31/12	\$132,312	40.29%	\$53,302	0%	\$0	\$53,302	25%	\$13,326
1/1/13 to 4/10/13	\$6,161	21.94%	\$1,352	14.66%	\$903	\$2,255	25%	\$564
Total:	\$138,473		\$54,654		\$903	\$55,557	25%	\$13,889

3. DigiCloth [2]

2/21/12 to 12/31/12	\$5,096	40.29%	\$2,053	0%	\$0	\$2,053	0%	\$0
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4. DigiStand [2]

2/21/12 to 12/31/12	\$5,461	40.29%	\$2,200	0%	\$0	\$2,200	0%	\$0
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5. Limiting Sales from November 22, 2012 to March 8, 2013 [1]

11/22/12 to 12/31/12	\$115,798	40.29%	\$46,650	0%	\$0	\$46,650	25%	\$11,662
1/1/13 to 3/8/13	\$199,780	21.94%	\$43,825	14.66%	\$29,279	\$73,104	25%	\$18,276
Total:	\$315,578		\$90,475		\$29,279	\$119,754	25%	\$29,938

6. Limiting Sales from February 21, 2012 to March 8, 2013 [1]

2/21/12 to 12/31/12	\$1,141,933	40.29%	\$460,033	0%	\$0	\$460,033	25%	\$115,008
1/1/13 to 3/8/13	\$199,780	21.94%	\$43,825	14.66%	\$29,279	\$73,104	25%	\$18,276
Total:	\$1,341,713		\$503,858		\$29,279	\$533,137	25%	\$133,284

7. Limiting Sales from November 22, 2012 to March 8, 2013 and Subdividing by Product [1]**DigiClean / MicroClean**

11/22/12 to 12/31/12	\$108,951	40.29%	\$43,891	0%	\$0	\$43,891	25%	\$10,973
1/1/13 to 3/8/13	\$193,619	21.94%	\$42,474	14.66%	\$28,376	\$70,849	25%	\$17,712
Subtotal:	\$302,570		\$86,365		\$28,376	\$114,741	25%	\$28,685

DigiPad

11/22/12 to 12/31/12	\$6,846	40.29%	\$2,758	0%	\$0	\$2,758	25%	\$690
1/1/13 to 3/8/13	\$6,161	21.94%	\$1,352	14.66%	\$903	\$2,255	25%	\$564
Subtotal:	\$13,008		\$4,110		\$903	\$5,013	25%	\$1,253
Total:	\$315,578		\$90,475		\$29,279	\$119,754	25%	\$29,938

8. Limiting Sales from February 21, 2012 to March 8, 2013 and Subdividing by Product [1]**DigiClean / MicroClean**

2/21/12 to 12/31/12	\$1,009,621	40.29%	\$406,730	0%	\$0	\$406,730	25%	\$101,683
1/1/13 to 3/8/13	\$193,619	21.94%	\$42,474	14.66%	\$28,376	\$70,849	25%	\$17,712
Subtotal:	\$1,203,239		\$449,204		\$28,376	\$477,580	25%	\$119,395

DigiPad

2/21/12 to 12/31/12	\$132,312	40.29%	\$53,302	0%	\$0	\$53,302	25%	\$13,326
1/1/13 to 3/8/13	\$6,161	21.94%	\$1,352	14.66%	\$903	\$2,255	25%	\$564
Subtotal:	\$138,473		\$54,654		\$903	\$55,557	25%	\$13,889
Total:	\$1,341,713		\$503,858		\$29,279	\$533,137	25%	\$133,284

Notes:

[1] Includes only sales for DigiPad and MicroClean Products.

[2] Not Claimed

**PLAINTIFF'S
EXHIBIT**

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